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October 20, 1994

The Honorable Rachelle Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

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Re: PP Docket No. 93-253 and GN Docket No. 93-252

Dear Commissioner Chong:

As a follow-up to our discussions in our October 5th meeting on the rules governing ownership of "Designated Entities" (DE's) eligible to bid on the entrepreneurs' block of broadband PCS licenses, this letter details the Commission's longstanding rules authorizing the use of management contracts by licensees for the management of their properties and explains how allowing Entrepreneurs' Block DE's to enter into management contracts with their passive investors is consistent with those rules.

Beginning with its Intermountain¹ decision, the Commission has created a thirty year body of rulings setting forth the specific facts and circumstances under which management contracts will not constitute unauthorized transfers of control (or attributable ownership interests) to outside management companies, including those management companies owned or controlled by investors in a licensee. These cases establish a "bright-line" test by which management contracts between DE's and their investors should be judged and by which the Commission may easily prohibit "shams".

In my view, the continuation of these policies in the Broadband PCS context is critical to the ability of DE's to obtain sufficient capitalization for their participation in the upcoming entrepreneurs' block auctions and their subsequent build-out of PCS properties.

The Intermountain Criteria

The Intermountain decision established six criteria² to determine whether a licensee has relinquished control of and responsibility for its licensed facilities. Those criteria are:

1. Does the licensee have unfettered use of all facilities and equipment?
2. Has the licensee relinquished control of daily operations?
3. Does the licensee determine and carry out policy decisions, including the preparation and filing of applications with the Commission?

¹ Intermountain Microwave, 24 RR 983 (1963).

² Id.

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4. Is the licensee in charge of employment, supervision, and dismissal of personnel?
5. Is the licensee in charge of the payment of financing obligations, including expenses arising out of operation of the licensed facilities?
6. Does the licensee receive monies and profits derived from operation of the licensed facilities?

These criteria examine a licensee's involvement *in all significant aspects* of the ownership and management of its licensed facilities, thereby enabling the Commission to make a prima facie determination whether a licensee has relinquished *de facto* or *de jure* control of its licensed facilities.

Applications of the Intermountain Criteria

Since Intermountain, the Commission has determined that:

- provision of financing and turnkey construction management of a licensee's facilities did not constitute a transfer of control by the licensee to the management contractor³;
- an unauthorized transfer of control had occurred where a cellular lottery winner was rarely present at his licensed facilities and had few duties, other than the approval of various expenses, over such facilities⁴;
- decisions regarding litigation, and the appointment, compensation and termination of a General Manager of a licensee's properties must remain in the hands of the licensee⁵; and
- advertising, personnel, and accounting functions must also remain under the licensee's general control.⁶

Further, in the recent D.C. Circuit's remand of the Commission's Ellis Thompson ruling⁷, the Commission has an opportunity to reaffirm its Intermountain criteria in the context of management contracts and clarify what further management delegations, if any, will not result in an unauthorized transfer of control.

Finally, the Commission stated in its Fifth Report and Order establishing the ownership attribution rules for Entrepreneurs' Block DE's that management contracts between DE's and their minority investors should be allowed and not considered attributable ownership interests:

³ Millicom of Omaha, Inc., 2 FCC Rcd 3754 (Com. Car. Bur. 1987).

⁴ Brian L. O'Neill, 6 FCC Rcd 2572, 2574-76 (1991).

⁵ LaStarr Cellular Tel. Co., 5 FCC Rcd 3286, 3289 (1990).

⁶ See generally Peoria Community Broadcasters, Inc., 79 F.C.C.2d 311 (1980); WWIZ, Inc., 36 F.C.C. 561 (1964), aff'd sub nom Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965).

⁷ Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42 (D.C. Cir. 1994).

"so long as the applicant [DE] remains under the de facto and de jure control of the control group, we shall not bar passive investors from entering into management agreements with applicants."⁸

The only reason such contracts are now at issue is because the Commission, in a subsequent Further Notice of Proposed Rulemaking to its Spectrum Cap Notice⁹, asked how management contracts between DE's and their passive investors should be construed in the context of whether the DE has *de facto* and *de jure* control of its licenses.¹⁰ (That issue was recently resolved in favor of allowing management contracts and finding only those agreements involving CMRS providers in the same market as creating an attributable interest for purposes of the spectrum allocation caps.¹¹

The Commission's PCS Mandate

While there is ample Commission precedent permitting management contracts in the wireless context, there are also strong policy reasons for the Commission to allow the use of management contracts between designated entities and their investors. In authorizing spectrum auctions, the Congress gave the Commission a specific mandate to provide women and minorities with a meaningful opportunity to participate in, and acquire, PCS licenses through the auction processes.¹² Further, both Congress and the Commission have made detailed findings regarding the historic under-representation of women and minorities in the communications industry.¹³ Indeed, this was a primary reason behind the establishment of the Entrepreneurs' Block.

Given the historic under-representation of women and minorities in the industry, it is fair to assume that women and minority-owned businesses will need to draw on outside expertise in order to operate successful PCS systems. Restricting their use of management contracts will only make it more difficult for these businesses to have a realistic chance of success. Further, it is unrealistic to assume that strategic investors in DE's will want the very companies in which they are investing to enter into management agreements with their competitors -- the only other logically available source of the kind of management expertise the DE's will need to acquire to protect their investments.

⁸ Fifth Report and Order, PP Docket No. 92-253, note 135, July 15, 1994 ("Order").

⁹ Second Further Notice of Proposed Rulemaking, GN Docket No. 93-252, July 18, 1994.

¹⁰ Id. at 2 - 3.

¹¹ FCC News Release, "Commission Adopts Spectrum Attribution Requirements for Management Agreements and Joint Market Arrangements," GN Docket No. 93-252, October 20, 1994.

¹² Order at ¶¶ 7-20.

¹³ Id. at ¶¶ 93-112.

Conclusion

For the reasons stated above, I urge the Commission to allow the use of management contracts in the broadband PCS arena to allow DE's to draw on much needed expertise and to provide their investors assurance that their systems will be expertly built and run. The Intermountain line of cases (including the now remanded Ellis Thompson decision) provide the Commission with a clear standard by which to evaluate and deter "sham" uses of management contracts.

Accordingly, I would urge you and your fellow Commissioners to use your Reconsideration of the Fifth Report and Order to clarify the permissible uses of management contracts by Entrepreneurs' Block DE's by:

- reiterating that the Intermountain tests will govern the facts and circumstances under which management contracts between DE's and their passive investors are permissible.

In closing, I note that the original and two copies of this letter were submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules governing ex parte communications.

Thank you for your careful consideration of this issue.

Sincerely,

A handwritten signature in black ink that reads "Sherrie Marshall". The signature is fluid and cursive, with the first name "Sherrie" and last name "Marshall" clearly distinguishable.

Sherrie Marshall

cc: Chairman Hundt
Commissioner Quello
Commissioner Barrett
Commissioner Ness
Robert Pepper
Donald Gips
Rosalind Allen
Sara Seidman